

**RULES ADOPTED BY
THE LEXINGTON CONSERVATION COMMISSION
PURSUANT TO THE CODE OF THE TOWN OF LEXINGTON
FOR WETLAND PROTECTION, CHAPTER 130**

(Formerly Town of Lexington General By-Laws Article XXXII, the General By-Law for Wetland Protection)

SECTION 1. INTRODUCTION

These regulations are promulgated by the Lexington Conservation Commission pursuant to the authority granted to it under Town of Lexington General By-Laws Article XXXII, the General By-Law for Wetland Protection. These regulations shall complement the By-law and shall have the force of law upon their effective date.

SECTION 2. PURPOSE

The By-Law establishes a public review and decision-making process by which activities affecting Protected Resource Areas are to be regulated in order to contribute to the protection of the following interests:

- public or private water supply
- ground water supply
- flood control
- storm damage prevention
- other water damage prevention
- prevention of pollution
- protection of surrounding land and other homes or buildings
- aquatic life or wildlife
- protection of streams, ponds, or other bodies of water

The purpose of the regulations is to define and clarify that process by establishing uniform procedures and standards by which the Lexington Conservation Commission may carry out its responsibilities under the By-Law.

SECTION 3. DEFINITIONS

Abutter is any landowner, as determined by the most recent assessors' records, whose land abuts the property that is the subject of the Notice of Intent or whose land lies directly across any street, road, river, stream, brook, or creek from the said property.

Alter is defined in Section 7.4 of the By-Law.

Applicant, as used in these regulations, shall mean a person giving notice of intention to remove, fill, dredge, build upon, or alter, or a person on whose behalf such a notice is filed.

Bank is defined in Section 7.5 of the By-Law.

Bog See Marsh.

Freshwater wetland is defined as it is in M.G.L. Chapter 131, Section 40, (hereafter known as M.G.L. Ch. 131, s. 40).

Land Actively Devoted to Agricultural Use shall mean the same as "Land in Agricultural Use" as defined in 310 CMR 10.04. Normal Maintenance and Improvement shall be defined as it is in 310 CMR 10.04.

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Land Subject to Flooding or Inundation is that land which, under existing conditions, would be defined as either "Bordering Land Subject to Flooding" in 310 CMR 10.57 or "Isolated Land Subject to Flooding".

Marsh, Bog, Wet Meadow, and Swamp are defined as they are in M.G.L. Ch. 131, s. 40, and are collectively known as vegetated wetlands. Credible evidence as to the wetland affinities of other vegetation in an area shall be considered in making wetland determinations.

Person, as used in these regulations, shall include any individual, group of individuals, association, partnership, corporation, business organization, trust, estate, the Commonwealth of Massachusetts or any public or quasi-public corporation or body when subject to Lexington By-Laws Article XXXII, any other legal entity, including the Town of Lexington or its legal representatives, agents, or assigns, or any combination of the preceding.

Protected Resource Area shall mean any bank, freshwater wetland, marsh, bog, wet meadow, swamp, creek, river, stream, pond, or lake or any land under said waters, or any land bordering thereon, or any land subject to flooding or inundation. Bordering in this context shall mean either (a) 100 feet horizontally lateral from the bank of any bog, marsh, meadow, or swamp bordering on a creek, river, stream, pond, lake, or wetland; or (b) 100 feet horizontally lateral from the water elevation of the 100-year storm, whichever is the greater of (a) or (b).

Swamp See Marsh

Wet Meadow See Marsh

SECTION 4. PROCEDURES

(1) Determination of Applicability

Any person who desires a determination as to whether the By- Law applies to any land or work to be performed thereon may submit a written request in triplicate to the Lexington Conservation Commission. The request shall be sent by certified mail or hand delivered, and shall be in the form required under M.G.L. Ch. 131, s. 40 and 310 CMR 10.00 and shall include such additional information as the Commission may require to aid in the evaluation.

Within 21 days of receipt of the complete request, the Commission shall issue a Determination of Applicability of By-Laws Article XXXII. Notice of the time and place of the public meeting at which the determination will be made shall be given by the Commission at the expense of the person making the request not less than 5 days prior to such meeting by publication in a newspaper of general circulation in Lexington, and by mailing a notice to the person making the request and to the owner. Said determination shall be signed by a majority of the Commission, and copies thereof shall be sent by the Commission to the person making the request and to the owner. Said determination shall be valid for 3 years from the date of issuance.

The decision of the Commission may be appealed according to the provisions of M.G.L. Ch. 249, s.4.

(2) Notice of Intent

(A) Filing Procedure

Any person who proposes to do work that will remove, fill, dredge, build upon, or alter any

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Protected Resource Area shall submit to the Commission a Notice of Intent, consisting of application materials required for a Notice of Intent under M.G.L. Ch. 131, s. 40 and 310 CMR 10.00 and containing such additional materials as the Commission may require to fully describe the proposed activity and its effect on the environment. Each such notice shall be accompanied by a filing fee to be determined in accordance with a fee schedule established by the Commission. Copies of such notice shall be sent at the same time, by certified mail or by hand delivery to the Commission, to the Town Engineer, Board of Selectmen, Planning Board, and Board of Health.

If the Notice of Intent is deemed by the Commission to be insufficient to fully describe the proposed activity and its effect on the environment, the Commission may, at its discretion: (a) notify the applicant, by certified mail within 10 days of receipt of the notice, of the additional information that will be necessary to render the notice sufficiently complete for acceptance. The filing fee shall be returned and the 30-day review period shall not begin until a complete application is submitted; or (b) inform the applicant at or prior to the public hearing of the additional information required, and offer the applicant the opportunity to continue the public hearing so that the additional information can be submitted for review.

(B) Public Hearing

A public hearing shall be held by the Commission within 30 days of the receipt of said Notice. Notice of the time and place of said hearing shall be given by the Commission at the expense of the applicant not less than 5 days prior to such hearing by publication in a newspaper of general circulation in Lexington, and by delivering or mailing a notice to the applicant, the owner, the Board of Health, Board of Selectmen, Town Engineer, Planning Board, and abutters of the land on which the proposed activity is to take place.

Public hearings may be continued as follows:

- (a) without the consent of the applicant, to a date, announced at the hearing, within 30 days of receipt of the Notice of Intent;
- (b) with the consent of the applicant, to an agreed-upon date, which shall be announced at the hearing; or
- (c) with the consent of the applicant, for a period not to exceed 30 days after the submission of a specified piece of information or the occurrence of a specified action. The date, time, and place of said continued hearing shall be publicized in accordance with the By-Law and notice shall be sent to any person who so requests in writing.

(C) Order of Conditions

Within 21 days of the close of the public hearing, or within such further time as the Commission and the applicant shall agree on, the Commission shall either:

- (a) make a determination that the area on which the work is proposed to be done, or which the proposed work will remove, fill, dredge, build upon, or alter, is not significant to any of the interests identified in the By-Law, and shall so notify the applicant; or
- (b) make a determination that the area on which the work is proposed to be done, or which the proposed work will remove, fill, dredge, build upon, or alter, is probably significant to one or more of the interests identified in the By-Law, and shall issue an Order of Conditions for the protection of said interest(s).

The Order of Conditions shall impose such conditions as are necessary to meet the performance standards set forth in Section 5 of these regulations and such additional conditions as are necessary for the protection of the interests identified in the By-Law. The Order shall prohibit any work or any portion thereof that cannot be conditioned to meet such standards. The Order may impose conditions on work

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outside Protected Resource Areas when, in the opinion of the Commission, (1) such work will have a direct impact on a Protected Resource Area by virtue of changes in the characteristics of storm drainage discharged to that Area from the property, or (2) such work is integrally connected with work to be undertaken within a Protected Resource Area and the only practical way to protect the interests of the By-Law is to regulate the project as a whole.

The Order shall be signed by a majority of the Conservation Commission. The Order shall be valid for a period of three years, provided, however, that the Commission may issue an Order for as little as one year or as much as five years where special circumstances warrant and where those special circumstances are set forth in the Order.

Prior to the commencement of any work permitted or required by the Order, the Order shall be recorded in the Middlesex South Registry of Deeds or Land Court within the chain of title of the affected property. In the case of recorded land, the final order shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the proposed work is to be done. In the case of registered land, the final order shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the proposed work is to be done. Certification of recording shall be promptly sent to the Commission. If work is undertaken without the applicant first recording the Order, the issuing authority may revoke the Order of Conditions, may issue an Enforcement Order or may itself record the Order of Conditions.

(D) Appeals

Any person aggrieved by the decision of the Conservation Commission, whether or not previously a party to the proceeding, may appeal the decision according to the provisions of M.G.L. Ch. 249, s. 4.

(E) Extensions

The Commission may extend an Order for one or more periods of up to 3 years each. The request for an extension shall be made to the Commission at least 30 days prior to expiration of the Order.

The Commission may deny the request for an extension and require the filing of a new Notice of Intent for the remaining work in the following circumstances:

- (a) where no work has begun on the project within a period of 3 years from the date of issuance of the Order, except where such failure is due to unavoidable delays, such as appeals, in the obtaining of other necessary permits;
- (b) where new information, not available at the time the Order was issued, has become available and indicates that the Order is not adequate to protect the interests identified in the By-Law;
- (c) where incomplete work is causing damage to the interests identified in the By-Law; or
- (d) where work has been done in violation of the Order or these regulations.

The Extension Permit shall be recorded in the Land Court or the Registry of Deeds, whichever is appropriate, and certification of recording shall be promptly sent to the Commission. If work is undertaken without the applicant so recording the Extension Permit, the Commission may issue an Enforcement Order or may itself record the Extension Permit.

(F) Certificates of Compliance

Upon written request by the applicant, the Commission shall issue a Certificate of Compliance within 21 days of receipt thereof provided that the activity or portions thereof described in the Notice of Intent and accompanying plans have been completed in compliance with the Order. If a project has been

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completed in accordance with plans stamped by a registered professional engineer, architect, landscape architect, or land surveyor, a written statement by such a professional person certifying substantial compliance with the plans and setting forth what deviation, if any, exists from the plans approved in the Order shall accompany the request for a Certificate of Compliance.

Prior to the issuance of a Certificate of Compliance, a site inspection shall be made by the Commission or its agent, in the presence of the applicant or the applicant's agent if desired by the applicant.

If the Commission determines, after review and inspection, that the work has not been done in compliance with the Order, it may refuse to issue a Certificate of Compliance. Such refusal shall be issued within 21 days of receipt of the request, shall be in writing, and shall specify the reasons for denial.

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If the final Order contains conditions which continue past the completion of the work, such as maintenance or monitoring, the Certificate of Compliance shall specify which, if any, of such conditions shall continue. The Certificate shall also specify to what portions of the work it applies, if it does not apply to all the work regulated by the Order.

The Certificate of Compliance shall be recorded in the Land Court or Registry of Deeds, whichever is appropriate. Certification of recording shall be promptly sent to the Commission. Upon failure of the applicant to so record, the Commission may do so.

SECTION 5. PERFORMANCE STANDARDS

(1) Incorporation of State Standards

Section 2.3 of the By-Law reads, "The Conservation Commission shall not impose additional or more stringent conditions as a result of any hearing conducted by it pursuant to M.G.L. Ch. 131, s. 40, than it has imposed pursuant to the provisions of this By-Law..." Implicit in this statement is that applicants seeking approval under the By-Law must at least meet all applicable state Wetland Protection Act standards. The standards of 310 CMR 10.53 -10.60 are therefore herein incorporated by reference. The Commission finds that protection of the interests identified in the By-Law requires that applicants also meet the following additional standards. Failure to meet these standards will result in the Commission's denial of an application.

(2) Increase in Runoff

Any proposed work that discharges to a protected resource area or connects to a storm drain system that discharges to a protected resource area shall not result in an increase in the peak rate of surface runoff during 2-year, 10-year, or 100-year return period design storm events and shall not result in an increase in the total volume of surface runoff for the 1-year return period storm. The design point for evaluating runoff will be at the furthest downgradient property boundary, except that a location interior to the property may be used as the design point if there are no proposed changes to the property downgradient of the proposed design point. For properties that drain in multiple directions under pre-development conditions, each downgradient discharge location will constitute a separate design point and these rules will apply both at each design point separately and in total for all design points. For purposes of comparing pre-development and post-development runoff rates, calculated runoff rate values shall be rounded to the nearest 0.01 cubic feet per second and runoff volume to the nearest 1 cubic foot.

Surface runoff calculations shall be performed using the Natural Resources Conservation Service (NRCS) Technical Release 20 (TR-20) or NRCS Technical Release 55 (TR-55) calculation methods and TR-55 parameter estimation methods, as modified by the Massachusetts NRCS office, except that the Rational Method/Modified Rational Method may be used for lot sizes less than one acre.

This rule shall not apply to additions or freestanding structures that increase the impervious area on the lot by less than 100 square feet unless evidence is presented that indicates the area downstream of the proposed addition is already subject to flooding problems, as determined by the Commission. On a given property, exemption from these rules for a less than 100 square-foot increase in impervious area may be taken no more than once in any 3-year period.

In addition to controlling peak rates of surface runoff, the annual ground water recharge under post-development conditions should approximate, or exceed, the pre-development recharge to the extent practicable. Guidelines for pre-development recharge based on soils types or other parameters and other design guidelines as issued by the Massachusetts Department of Environmental Protection shall be used to evaluate ground water recharge.

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Swimming pools shall be treated as impervious surfaces, with the following exception. If the pool can be shown to capture the entire design storm and does not discharge the captured water outside the closed pool system for a period of at least 24-hours after the end of a storm event, the water surface area of the pool may be considered to adequately control runoff from rain falling directly on the water surface for purposes of runoff rate and volume evaluation. No other portions of the property shall be considered to drain into the pool when evaluating runoff rate and volume.

Commentary:

Increases in peak runoff from a property result in increases in flooding downstream of the property. Storms of 2-year, 10-year, and 100-year return frequencies were selected as representative of the range of storms that may cause flooding damage. While compliance with this standard does not ensure no increase in downstream flooding as a result of a project, the Commission believes this standard to represent a reasonable compromise between the desire to prevent an increase in flooding and the cost of proving no increase will occur. The Conservation Commission will not approve deviations from these rules unless it is persuaded by clear and convincing evidence presented by the applicant that the proposed design will secure the interests of the Massachusetts Wetlands Protection Act and the Town of Lexington By-Laws §130, Wetlands Protection.

In recognition of the cumulative environmental damage that has been caused by existing development prior to the promulgation of effective stormwater management rules, the Conservation Commission strongly encourages the retrofitting of existing structures with stormwater management controls that meet the requirements of these rules and the Massachusetts Department of Environmental Protection stormwater policy and standards to the extent practicable. The Commission also encourages minimization of impervious areas and use of low-impact design methods.

(3) Structures in Floodplain

No building of any kind, and no parking lot or any other facility for the temporary or permanent storage of automobiles, trucks, or other material shall be located below the 10-year flood level.

Commentary:

Buildings located within floodplains, despite reasonable precautions during their design, may be seriously damaged by floodwaters and objects borne by these waters. Access to such structures in periods of flood is hazardous but may be attempted for the protection of life or property. Floodproofing may fail during such periods, and materials stored in these structures, including potentially hazardous pollutants, may be released to floodwaters.

Parking lots and other temporary storage facilities located within floodplains may cause harm to the interests identified in the By-Law in several ways. Oil, gasoline, grease, sand, salt, and other pollutants commonly found on parking lot surfaces will be swept into nearby wetlands by flood waters. Vehicles and other materials occupy space that otherwise would be available for flood storage, thereby increasing the severity of flooding elsewhere. Automobiles and other materials stored in such areas will be damaged by the rising floodwaters, causing economic loss, and attempts to prevent such loss during periods of flood may lead to injury and loss of life. Materials stored in such areas may be carried away by floodwaters and may block culverts and other constrictions, thereby increasing the severity of localized flooding.

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(4) Wildlife Habitat Impact and Mitigation

On any application for the approval of a project involving the disturbance of more than 20,000 square feet within a Protected Resource Area, the Commission may require (a) an analysis, by a competent wildlife biologist, of (1) the habitat value of the parcel of land to be disturbed and of the adjacent area, and (2) the impact of the proposed development on wildlife populations and habitat value, and (b) proposed measures to be taken during construction and during operation to mitigate these impacts. Where project size warrants, the Commission may require the submission of the results of a quantitative habitat analysis, such as the Habitat Evaluation Procedures (HEP) developed by the U.S. Fish and Wildlife Service. For projects that may disturb less than 20,000 square feet, the Commission may require such an analysis on a case-by-case basis after an inspection and review of the property and project. The Commission may impose whatever conditions it deems necessary to limit impacts on wildlife to acceptable levels, regardless of project size.

Commentary:

Wetlands and adjacent uplands are widely recognized as often being highly productive of wildlife, and changes in one part of a wetlands system may have ramifications for wildlife throughout the system and beyond. In many cases, small changes in project design or relatively simple mitigation measures may result in large changes in wildlife impact. It is the Commission's intent to take advantage of these possibilities through explicit consideration of wildlife impacts on large projects. The size limit was selected to exempt most single-family homes and other small projects; while such projects may have a substantial cumulative impact, in general their individual impacts will be minor and individual review would be unnecessarily time-consuming and costly.

(5) Buffer Zone:

A. New Construction

1. No setbacks for structures necessary for upland access where reasonable alternative access is unavailable, for wetland dependent structures such as drain outfalls, weirs, etc. and for underground utilities.
2. 25 feet - 100 feet for roads, driveways, retaining walls.
3. 50 feet - 100 feet for all other structures: residential and commercial buildings, garages, parking lots, decks, etc.
4. 100 feet plus for underground storage of gasoline, oil or other fuels and hazardous materials.

B. Existing Structures

Properties presently not in compliance with the above will not be permitted to increase their degree of non-conformance, e.g., owners of a house currently 35 feet from the wetlands edge can build an addition that maintains a 35-foot setback, but not one that has a 30-foot setback.

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C. Site Development and Landscaping

1. Of contiguous land within the 100-foot buffer zone, construction activities can disturb no more than 50% or the amount not presently supporting a natural community, whichever is greater.
2. Within 25 feet of a wetland a critical edge shall be required where:
 - a. there shall be no clearcutting of trees and surface vegetation, only selective thinning of trees to a spacing of not more than 20 feet;
 - b. brush may be topped to a height of three feet or replaced with a more desirable species;
 - c. areas disturbed by construction must be planted with a continuous groundcover requiring no fertilizers or pesticides for maintenance.
3. Critical edge may be waived to provide access to bodies of water.

Commentary:

Past experience has shown that construction within these buffer zones is very likely to cause significant harm to the interests sought to be protected by the General By-Law for Wetland Protection. The Conservation Commission will therefore not approve any smaller buffer zone unless it is persuaded by clear and convincing evidence that the smaller buffer zone will secure the protection of those interests.

(6) Pre-Development Conditions

Under these rules and when evaluating compliance with Massachusetts Department of Environmental Protection storm water management policy and standards, the following definitions shall apply:

"Predevelopment" or "existing" conditions shall mean the following:

- When the proposed work consists of additions to development previously constructed on the property that will continue to be in use after the proposed development, "predevelopment" or "existing" conditions shall mean conditions at the time of the proposal.
- When one or more existing structures on the property are to be demolished, "predevelopment" or "existing" conditions shall mean conditions prior to the existence of the structures to be demolished and prior to the existence of any other impervious surfaces (such as paved driveways or walkways) associated with the structures to be demolished. Pre-development runoff calculations for the existing structure footprint, other impervious areas associated with the structure to be demolished, and existing landscaped portions of the property may be based on open space in good condition (as defined in NRCS TR-55, or equivalent for the Rational Method) using an area-weighted average of soil types on the undeveloped portions of the property. Landscaped portions of the property count as undeveloped for purposes of evaluating soil type.

SECTION 6. CHANGES IN SUBMITTED PLANS

If, at any time after a Determination of Applicability or Order of Conditions has been issued, there is a change in the proposed activity, the person on whose behalf the work is being done, in the case of a

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Determination, or the applicant, in the case of an Order, must notify the Commission, in writing or in person, of the proposed changes. No work associated with these changes shall be done on the subject area until the Commission has reviewed the changes and issued its decision.

The Commission shall review these changes and determine either:

- (a) that the changes represent a substantial departure from the original proposal and that the potential impacts of the new proposal on the interests identified in the By-Law are sufficiently different from those of the original proposal as to require the filing of a new Request for Determination or Notice of Intent;
- (b) that the changes involve a substantial departure from the original proposal in only one or two limited respects, and that the Commission will consider amending the original Determination or Order following submission of information on the proposed changes and their potential impacts on the interests identified in the By-Law and following a public meeting or hearing and notice as required in Sections 4(1) and 4(2) above; or
- (c) that the changes represent an insignificant change in the original proposal and will cause no significant difference in the impact of the activity on the interests identified in the By-Law, in which case the person proposing these changes may proceed in conformance with them.

The person making this request shall be notified by the Commission of its decision within 21 days of receipt of his request.

SECTION 7. ENFORCEMENT

Any person who violates any provision of the By-Law, the rules and regulations promulgated under it, or any conditions of a valid Order of Conditions shall be punished by a fine of not more than \$300. Each day or portion thereof of continuing violation shall constitute a separate offense. The By-Law, these rules and regulations, and all Orders of Conditions may be enforced by any Town Police Officer or other officer having police powers.

The members and agents of the Commission may enter upon privately owned land for the purpose of performing their duties under the By-Law and these rules and regulations.

When the Commission determines that an activity is in violation of the By-Law, these rules and regulations, or a final Order of Conditions, the Commission may issue an Enforcement Order. Violations include, but are not limited to:

- (a) failure to comply with a final Order, such as failure to observe a particular condition or time period specified in the Order;
- (b) failure to complete work described in a final Order, when such failure causes damage to the interests identified in the By-Law; or
- (c) failure to obtain a valid Order of Conditions or Extension Permit prior to conducting an activity subject to regulation under the By-Law.

An Enforcement Order issued by the Commission shall be signed by a majority of the Commission. In a situation requiring immediate action, an Enforcement Order may be signed by a single member or agent of the Commission, provided said Order is ratified by a majority of the members at the next scheduled meeting of the Commission.

SECTION 8. SECURITY

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The Commission may require, as a permit condition, that the performance and observance of the Order of Conditions be secured by one or both of the following methods:

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- (a) By a bond or deposit of money or negotiable securities in an amount and form determined by the Commission to be sufficient to secure the completion of all conservation measures specified in their Order of Conditions; and, the Commission may require that the applicant specify the time within which such construction shall be completed.

The penal sum of any such bond shall bear a direct and reasonable relationship to the expected costs, including the effects of inflation, necessary to complete the sub-work. Such amount or amounts shall be from time to time reduced as is, in the determination of the Commission, necessary to reflect the actual expected costs of the work remaining to be completed.

- (b) By a covenant, executed and duly recorded by the owner of record, running with the land whereby such conservation measures, as are stated in the Order of Conditions, shall be provided before any lot may be built upon or conveyed. A deed of any part of the subject property in violation hereof shall be voidable by the grantee prior to the release of the covenant, but not later than three years from the date of such deed.

The bond or covenant shall, in the case of the bond, be given to the Town, and, in the case of a covenant, be recorded in the Registry of Deeds within 14 days of the granting of the Order of Conditions.

SECTION 9. WAIVER OF REGULATIONS

Strict compliance with these rules and regulations may be waived when, in the judgement of the Conservation Commission, such action would serve a substantial public interest or when strict compliance would result in severe economic hardship far greater in magnitude than the public interest to be served. In the latter case, the Commission may require that compensatory or mitigating measures be taken, even at an off-site location, to protect the public interest in the Protected Resource Area to be removed, filled, dredged, built upon, or altered.

SECTION 10. SEVERABILITY

If any provision of any part of these rules and regulations or the application thereof is held to be invalid, such invalidity shall not affect any other provision of these rules and regulations.

SECTION 11. EFFECTIVE DATE

These rules and regulations shall take effect upon adoption and shall apply to all Notices of Intent filed on or after that date and any procedures or work conducted pursuant to such filings. They shall not apply to any Notice of Intent filed prior to their effective date nor to any extensions of any Order of Conditions, the Notice of Intent for which was filed prior to said effective date.

(Adopted by vote of the Commission on July 30, 1985, unless otherwise noted)

7/30/85

Section 5(3) ("Buffer Zone") repealed 10/7/86

Sections 5(3) and 5(4) added 1/14/87

Technical corrections 12/15/87

Section 5(5) ("Buffer Zone") reinstated/revised 7/21/92

Section 5(1) and 5(2) amended and 5(6) added 1/23/07